

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

GRIEVANT,)	
)	
Employee/Grievant,)	DOCKET No. 15-10-637
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL)	
SERVICES/DIVISION OF MANAGEMENT,)	<i>[PUBLIC, REDACTED]</i>
SERVICES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on June 16, 2016 in the Farmington-Felton Conference Room, at the Delaware Department of Transportation, located at 800 Bay Road, Dover, DE 19901. The hearing was closed to the public, pursuant to 29 Del.C. §10004(b)(8).

BEFORE W. Michael Tupman, Chair, Jacqueline Jenkins, Ed.D., Paul Houck, and Sheldon Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Kevin Fasic, Esq.
Cooch and Taylor
on behalf of the Grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (“DHSS”), Division of Management Services (“DMS”) offered and the Board admitted into evidence without objection thirteen exhibits marked for identification as A-M. In addition, the day of the hearing, DMS offered and the Board admitted into evidence Hearing Exhibit N¹. DMS called two witnesses: Heather Morton (“Morton”), Controller II, DMS; and Shawn Avanzato (“Avanzato”), DMS Fiscal Administrative Officer.

The employee/grievant (“Grievant”), offered nine exhibits and the Board admitted into evidence without objection eight exhibits marked for identification as 1, 2, 4 – 9. The Grievant testified on her own behalf.

FINDINGS OF FACT

The Grievant worked as an Accounting Specialist in the payroll unit at DMS prior to being terminated from her employment on September 4, 2015. The primary responsibility of an Accounting Specialist includes entering payroll in an accurate and timely manner into the Payroll/Human Resource Statewide Technology (PHRST)² system.

There were four employees who worked in the DMS payroll accounting unit at the time of the incident(s), including the Grievant. For purposes of this decision, the other three employees are identified simply as KP, CK and AS, as there are other related grievances which are currently pending. CK held the position of Accountant, while the other employees held

¹ Agency Rebuttal Exhibit N was admitted during the hearing. It was a spreadsheet summarizing PHRST records of password changes to the Employee Self-Service log-in on the Grievant’s account between 4/25/14 and 6/5/15.

² PHRST, a statewide system, allows staff to enter, update, modify, delete, retrieve/inquire and report data in three areas: human resources, benefits and payroll.

Accounting Specialist positions.

The State payroll system defaults at 75 hours per two-week pay-period (which ends on Sunday) for regular wage payment purposes. Overtime must be authorized and is reported to the payroll accounting office through the use of an “exceptions report.” The information in the exceptions report must be manually entered into the PHRST system by an Accounting Specialist. When the information has been entered, the Accounting Specialist entering the data verifies it by writing a hash mark and her initials on the exceptions report. A second hash mark and set of initials is entered by the individual who is conducting the quality assurance review. The review occurs the same day or as soon as possible after the initial entry is keyed into the system (usually by not later than Wednesday afternoon). DMS normally finalizes its payroll and sends it over to be paid on the following Friday, approximately two days after the data has been entered.

PHRST will not allow Accounting Specialists to enter their own time. All Accounting Specialists received training on PHRST and receive a unique identification and password to gain access to the system. The PHRST system requires that passwords have certain characteristics and that they be changed regularly for security purposes.

On or around June of 2015, an issue with unauthorized payments was brought to the attention of the DMS Controller (“Morton”) by the Grievant’s supervisor. Morton testified she received an email on June 18, 2015, from the DMS Fiscal Administrative Officer (“Avanzato”) stating KP had come to him expressing concerns that the department’s overtime policy was not being fairly administered in the payroll accounting unit. KP appeared upset that both she and the Grievant had been denied authorization for overtime they had worked because they did not have the required back-up documentation to be paid overtime. KP entered the Grievant’s payroll information (without payment for overtime) and the entry had been checked by another

employee who was responsible for quality control. KP went into PHRST after the pay checks had been issued to view the Grievant's pay check, at which time she found that the Grievant had been paid for the unauthorized overtime. KP reported to the fiscal office her belief that the Grievant's payroll records had been changed after KP had entered it initially and the quality control check had been completed. KP related her belief that CK, AS and the Grievant were all involved in procuring unauthorized overtime payments.

During the initial investigation, Morton confirmed that the Grievant received unauthorized overtime. DMS denied authorization for overtime payment to the Grievant on the exception report for the pay period of May 17, 2015 through May 30, 2015. However, the pay check report revealed the Grievant was paid for five hours of straight overtime and 8.75 hours of overtime at time-and-a-half. The payout resulted in an overpayment of \$293.63 in the Grievant's pay check.

Morton also determined that CK had received a large amount of overtime during the same pay period that was also not authorized by an exceptions report. The exceptions report for CK included approval for 2.5 hours of straight overtime and one hour of overtime at the time-and-a-half rate. However, CK received five hours of straight overtime and 5.25 hours of overtime at time-and-a-half. In addition, she received 2.5 hours of straight overtime, 29.75 hours of overtime at time-and-a-half and 7.5 hours of holiday pay. This resulted in CK receiving an additional \$1,100 in her pay check.

The records indicated the changes to the timekeeping records of both CK and the Grievant were made by KP after the quality control review had been completed. No modifications were listed in the documentation after KP's entries.

Based on this information, Morton initiated a full investigation into the payroll records

for all DMS employees in New Castle County, focusing on overtime paid in FY 2014 and FY 2015. The investigation included a review of exception reports, payroll/pay check reports and a PHRST audit trail. The investigation revealed similar types of transactions for the following pay periods: October 18, 2014; November 1, 2014; December 13, 2014; December 27, 2014; January 24, 2015; February 21, 2015; April 4, 2015 and May 16, 2015. In total, the Grievant received \$2,865.87 in unauthorized overtime payments in FY 2015 that were initially keyed in under either KP's or CK's user identification. DMS alleges that due to the amount of overpayment the Grievant should have known that she received monies that were not due her and failed to report it. No unauthorized overtime payments for the other three in the unit were keyed in under the Grievant's user identification.

The Grievant maintains she had no knowledge of the overpayment until she met with the DHSS Labor Relations staff in July, 2015, nor was she complicit in any scheme to obtain unauthorized overtime payments. The Grievant testified she never checked her pay check report (which was available through PHRST) and did not reconcile her bank statement and pay check reports. The Grievant stated she only received notifications from her bank if her account balance dropped below a certain monetary limit. The Grievant received her pay check through direct deposit into her PNC Bank account. According to her, this account has multiple deposits including her pay check, her online clothes business, a Pay Pal account and her husband's deposits for bills and special occasions. According to the Grievant, all her bills are paid by direct debit from this account.

DMS contacted PHRST and learned the Grievant changed her PHRST password three times via the self-service option on January 29, 2015, June 1, 2015 and June 5, 2015 (periods of time in which she received unauthorized overpayments). DMS admits that it can only see she

changed the password and not whether she went into her pay check report or some other area of PHRST or even whether she used the password to enter the system. The Grievant testified the spousal certification for insurance benefits is due about that time and perhaps she viewed the benefits portion. She maintained, however, she never looked at her pay check reports.

On July 29, 2015, the DMS Deputy Director (“Cannon”) informed the Grievant in writing that she was being suspended with pay pending the conclusion of an on-going investigation into payroll discrepancies. The letter alleged the Grievant inserted unauthorized overtime and holiday pay information in PHRST for a coworker and that she received unauthorized overtime and holiday pay for that same period totaling \$2,865.87. On August 5, 2015, Cannon advised the Grievant in writing of her recommendation to terminate her employment as an Accounting Specialist with DMS. Specifically, DMS stated the Grievant violated the State’s Code of Conduct and DHSS Policy Memorandum #3 when it was determined that she was complicit in a scheme to defraud the State by receiving unauthorized funds in her pay check and failing to report an overpayment. The letter cited three violations as the basis for the recommended termination:

- 1) Any violation of the State’s Code of Conduct (ethics violations) could result in administrative sanctions (including termination), criminal sanctions or both. Information regarding state ethics can be found at <http://www.state.de.us/pic/default.shtml>.
- 2) The State’s Code of Conduct: “Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, state, officer, honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.” 29 Del. C. § 5806.
- 3) DHSS Policy Memorandum #3, Appropriate Use of DHSS Information Technology: “It is expected that users will conduct State of Delaware business with integrity, respect and prudent judgment while upholding the state’s commitment to the highest standard of conduct.”

In a letter dated September 4, 2015, the Cabinet Secretary informed the Grievant of her decision to uphold the recommendation to terminate the Grievant's employment with DMS. The Secretary stated that based on the Grievant's unique position as an Accounting Specialist in payroll and the trust that is bestowed upon her in that position, the breach of that trust was egregious and could not be tolerated. The Secretary noted that it seemed implausible that someone whose job it is to make sure that DHSS employees are paid accurately and timely can be remiss when it comes to knowing how much money she is receiving in her bi-weekly pay checks and/or noticing glaring discrepancies when reconciling her personal bank account.

The Board finds as a matter of fact that there is no evidence in the record that the Grievant enlisted the help of a co-worker to enter the PHRST system and credit unearned overtime and holiday pay into her paychecks.

The Board finds as a matter of fact that there is no evidence in the record that the Grievant used her PHRST identification and password to credit unearned time into any other employee's pay records.

The Board finds as a matter of fact that the Grievant did not become aware of the overpayment to her personal bank account until it was brought to her attention during a meeting with Labor Relations in July, 2015.

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified

due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board concludes as a matter of law that the Grievant met her burden to prove that DMS did not have just cause to cause to terminate her. There is no evidence that the Grievant was involved in a scheme to obtain unauthorized overtime payments, or that she knew prior to her meeting with Labor Relations in July, 2015, of the overpayments to her bank account. At most, DMS tried to couple an inference of a conspiracy to defraud with a belief that any reasonable person would reconcile her PHRST payroll records with her personal on-line bank statements. DMS, however, did not present the testimony of a co-conspirator to rebut the Grievant's testimony, and while her personal accounting habits hardly qualify as best practices, the Board found her testimony in that regard credible.

Unlike KP and CK, the Grievant's PHRST user identification was never used to enter any unauthorized overtime payments to anyone else in her unit. While the Grievant received \$2,865.87 in unauthorized overtime, there was no evidence in the record to support the conclusion that she had knowledge that she had received the payments (which were directly deposited into her personal bank account) over the course of seven months. The Board finds the Grievant's testimony credible concerning her paycheck being directly deposited into an account along with receipts from her clothing business, a Pay Pal account and deposits from her husband for bills and special occasions. While DMS found the Grievant changed her PHRST password three times contemporaneously within the pay periods in which she received unauthorized payments, it admits the system cannot track whether the Grievant actually used the password to enter the system or from which computer the Grievant may have entered in the system.

The Board finds the Grievant successfully challenged DMS' conclusion that she failed to report an overpayment because it did not establish that the Grievant knew she had received the payments. The Grievant testified she had no idea she had received an overpayment until she met with the Labor Relations staff in July, 2015. She testified, and the Board found credible, that her bank only notified her when her account balance fell below a certain limit. In addition, her bills were automatically debited from her account and therefore she had no check book to reconcile with her statement. The Grievant maintained that she never used the self-service portion of PHRST to check her pay check reports. If she changed her password and entered the system, it would possibly be to view benefits information such as the spousal certification form.

The Board finds the penalty of termination was not appropriate to the circumstances because the record was insufficient to conclude that the Grievant had committed the offenses with which she was charged.

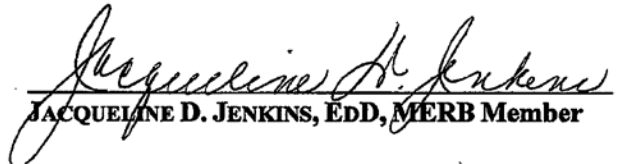
ORDER

It is this **10th** day of **August**, **2016**, by a vote of 3-1, the Decision and Order of the Board to grant the Grievant's appeal. All references to the Grievant's termination should be immediately removed from her employment records. The Board orders DMS to reinstate The Grievant to her former or a comparable position within thirty (30) days of the date of the hearing, with back pay from the date of termination to the date of reinstatement, less any monies earned during that period, (including from unemployment benefits and income from other employment) and less the unreimbursed amount of the undisputed overpayments she received and which are at issue in this matter. Counsel for the parties indicated that they may be able to reach an amicable settlement of this dispute within that period of time. The Board always encourages the

parties to do so, but without getting involved in the settlement process itself. If the parties reach a settlement within that time, they shall so advise the Board Administrator in writing and include a withdrawal of the Grievant's appeal. If the parties are unable to agree on a comparable position for reinstatement within thirty (30) days, then it shall be the default order of the Board to reinstate the Grievant to her former position as an Accounting Specialist. If the parties are unable to reach a settlement during that time, they shall so advise the Board Administrator in writing. Until then, the Board shall retain jurisdiction of the case to resolve any issues regarding calculation of back pay.


W. MICHAEL TUPMAN, MERB CHAIR
PAUL R. HOUCK, MERB Member
SHELDON N. SANDLER, ESQ., MEMBER

I respectfully disagree with the conclusions reached by the majority of the Board.


JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that if the Board upholds the decision of the appointing authority, the employee shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the employee. If the Board finds against the appointing authority, the appointing authority shall have a right of appeal to the Superior Court on the question of whether the appointing authority acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the appointing authority. All appeals to the Superior Court shall be by the filing of a notice of appeal with the Court within 30 days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **August 10**, 2016

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

MERB website